

TO: Air Pollution Control Board

FROM: Nancy M. King
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SUBJECT: Recall and Readoption of LSA Document #99-218

DATE: August 1, 2001

Factual Background

At the January 3, 2001, air pollution control board meeting, the board final adopted amendments to 326 IAC 6-1, rules for nonattainment area particulate. After reviewing what the board adopted, the Attorney General noticed several issues that needed to be resolved prior to approval of the rule. IDEM submitted a formal notice of recall to the Legislative Services Agency (LSA) for publication in the *Indiana Register*.

Under IC 4-22-2-40, a rule may be recalled at any time before the rule is accepted for filing by the Secretary of State. Under this same statute, a board may reconsider its adoption action and adopt either an identical rule or a revised rule. (IC 4-22-2-40(c)).

Reasons for Recall

The Attorney General's concern with LSA Document #99-218 arose from the manner in which certain documents were incorporated into the rule by reference. The rule incorporated by reference a book called the Compilation of Air Pollution Emission Factors (AP-42). IDEM uses AP-42 to calculate emission limits by individual processes for various uses including permitting and modeling.

Due to the nature of the text and the constantly changing standards, AP-42 is subject to frequent updates. In order to keep up with these updates and make the rule always subject to the newest standards, IDEM incorporated AP-42 using the language, "and the latest editions" and "and succeeding amendments". Although this particular language was not added in this rulemaking, the language surrounding the reference was amended in this rulemaking, which is how the AG noticed the error in the language.

This language is called a future incorporation by reference. In essence, it tries to incorporate language which has not yet been written. Although IC 4-22-2-21 allows for use of incorporation by reference to materials already written, it does not allow for future incorporations.

Therefore, this language must be removed and replaced with language which refers to texts we currently have available. At this time, IDEM is considering a rulemaking which will update AP-42 regularly so each rule that incorporates AP-42 will always have the newest version of the document available.

Finally, a change is required to the Code of Federal Regulations (CFR) incorporation by reference footnote so the CFR is properly identified. In the current version, the word 'citation' is used to reference the CFR. The reference is not a citation but a document, therefore, the language has been changed.

Board Action

Under IC 4-22-2-40, the board may readopt a rule after an agency recalls it. The board may adopt either the identical rule or a revised rule. (IC 4-22-2-40(c)) The rule will then be resubmitted to the Attorney General for approval, submitted to the Governor's office for approval and signature, submitted to the Secretary of State upon signature, and published as a final rule in the *Indiana Register*. No public hearing is required prior to readoption.

The agency requests that the board adopt the above-referenced amendments to the rule and then readopt the rule as amended. Any questions you may have regarding the rule itself or the process of readoption can be answered at the August 1 board meeting.